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Miscellaneous:

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-738

THE MESCALERO APACHE TRIBE, PETITIONER

v.

FRANKLIN JONES, COMMISSIONER OF THE BUREAU OF REVENUE OF THE STATE OF NEW MEXICO, ET AL.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

OPINIONS BELOW

The order of the Supreme Court of the State of New Mexico denying certiorari to the Court of Appeals of New Mexico is reported at 83 N.M. 161. The opinion of the New Mexico Court of Appeals (App. 62-77) is reported at 83 N.M. 158.

JURISDICTION

After denial of certiorari by the Supreme Court of New Mexico on October 6, 1971, the Court of Appeals of New Mexico entered final judgment on October 8, 1971 (App. 88). A petition for a writ of certiorari was filed with this Court on December 4, 1971, and was granted on April 24, 1972. This Court's jurisdiction rests on 28 U.S.C. 1257(3).

QUESTIONS PRESENTED

1. Whether the State of New Mexico may lawfully tax the petitioner Tribe's gross receipts from a winter sports and resort facility financed by the federal government and operated by the Tribe partially on its reservation land but principally on contiguous land owned by the United States and made available to the Tribe by the United States for the Tribe's use for a period of thirty years.

2. Whether the State of New Mexico has authority to impose a tax on personal property owned by the Tribe and used in the operation of the same facility.

STATUTES INVOLVED

25 U.S.C. 465 provides in relevant part:

> *Acquisition of lands, water rights or surface rights; appropriation; title to lands; tax exemption.*
>
> The Secretary of the Interior is authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians.
>
> * * * * * *
>
> Title to any lands or rights acquired pursuant to sections 461, 462, 463, 464, 465, 466 to 470, 471 to 473, 474, 475, 476 to 478, and 479 of this title shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, *and*

such lands or rights shall be exempt from State and local taxation. [Emphasis supplied.]

25 U.S.C. 470 reads as follows:

> There is authorized to be appropriated, out of any funds in the Treasury not otherwise appropriated, the sum of $20,000,000 to be established as a revolving fund from which the Secretary of the Interior, under such rules and regulations as he may prescribe, may make loans to Indian chartered corporations for the purpose of promoting the economic development of such tribes and of their members, and may defray the expenses of administering such loans. Repayment of amounts loaned under this authorization shall be credited to the revolving fund and shall be available for the purposes for which the fund is established.

25 U.S.C. 476 reads as follows:

> Any Indian tribe, or tribes, residing on the same reservation, shall have the right to organize for its common welfare, and may adopt an appropriate constitution and bylaws * * *. Such constitution and bylaws, when ratified as aforesaid and approved by the Secretary of the Interior, shall be revocable by an election open to the same voters and conducted in the same manner as hereinabove provided. Amendments to the constitution and bylaws may be ratified and approved by the Secretary in the same manner as the original constitution and bylaws.
>
> In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in

such tribe or its tribal council the following rights and powers: * * * to negotiate with the Federal, State, and local Governments. The Secretary of the Interior shall advise such tribe or its tribal council of all appropriation estimates or Federal projects for the benefit of the tribe prior to the submission of such estimates to the Bureau of the Budget and the Congress.

Section 2, cl. 2, of the Enabling Act for New Mexico of June 20, 1910, 36 Stat. 557, provides in pertinent part:

That the people inhabiting said proposed State do agree and declare that they forever disclaim all right and title to the unappropriated and ungranted public lands lying within the boundaries thereof and to all lands lying within said boundaries owned or held by any Indian or Indian tribes the right or title to which shall have been acquired through or from the United States or any prior sovereignty, and that until the title of such Indian or Indian tribes shall have been extinguished the same shall be and remain subject to the disposition and under the absolute jurisdiction and control of the Congress of the United States; * * * that no taxes shall be imposed by the State upon lands or property therein belonging to or which may hereafter be acquired by the United States or reserved for its use; but nothing herein or in the ordinance herein provided for, shall preclude the said State from taxing, as other lands and other property are taxed, any lands and other property outside of an Indian reservation owned or held by any Indian, save and except such lands as have been granted or acquired as aforesaid or as may be granted or

confirmed to any Indian or Indians under any Act of Congress, but said ordinance shall provide that all such lands shall be exempt from taxation by said State so long and to such extent as Congress has prescribed or may hereafter prescribe.

The revenue statutes of the State of New Mexico provide in pertinent parts:

72-16-4.10. *Privilege taxes—Business services.*—The tax shall be computed at an amount equal to two per cent [2%] of the gross receipts of any person engaging or continuing in any of the following or similar businesses: * * * hotels, camp grounds, rooming and boarding houses, bath and bath houses, restaurants, * * * and any other business in which services (not professional) are performed on a price or fee basis * * *.

72-17-3. *Tax on tangible personal property stored, used or consumed in state.*—An excise tax is hereby imposed on the storage, use or other consumption in this state of tangible personal property purchased from a retailer on or after July 1, 1939, and stored, used or consumed in this state at the rate of two per cent [2%] of the sales price of such property; * * *.

INTEREST OF THE UNITED STATES

In order to foster Indian economic development, Congress, in 25 U.S.C. 465, authorized the United States to obtain additional lands for the use of Indian tribes and specified that such lands shall be exempt from state and local taxation. State taxation of the Indians' utilization of such lands is of concern to the

United States because of its adverse effect on accomplishment of the federal statutory purpose.

STATEMENT

This is an action by the Mescalero Apache Tribe of Indians protesting the assessment of certain taxes by the State of New Mexico and seeking a refund. The taxes affect a ski resort owned and operated by the Tribe partially on its original reservation land but principally in the Lincoln National Forest under a special-use permit issued by the United States Forest Service. The project is financed by the United States pursuant to 25 U.S.C. 470. The enterprise is designed to provide revenue for the Tribe and job training for approximately 25 tribal members (App. 3–4, Stipulation No. 6).

From October 1, 1963, through December 31, 1966, the Tribe paid under protest $26,086.47 in taxes to the State, based on the gross receipts received from the operation of the ski resort (App. 6, Stipulation 14). In addition, New Mexico assessed use taxes against the Tribe, based on the purchase price paid for materials used to build two ski lifts, in the amount of $5,887.19, plus approximately $1,500 in penalties and interest. The period covered by the use tax assessments extended from September 1, 1963, through April 30, 1968 (App. 4–5, Stipulation 9).

The New Mexico State Commissioner of Revenue denied a claim for refund and protest of assessment (App. 57–58). The Court of Appeals of the State of New Mexico affirmed (App. 62–71), holding essentially that the enterprise and property involved in

this case were not within an Indian reservation and thus under the New Mexico Enabling Act could be taxed by the State. The State Supreme Court denied certiorari (App. 88). Petitioner then filed a petition for a writ of certiorari in this Court, which granted the petition on April 24, 1972.

SUMMARY OF ARGUMENT

I

1. The Indian Reorganization Act of 1934 (the Wheeler Act) provided a legislative basis for the economic revitalization of Indian tribes after a period of tribal decline. As part of its plan, it provided a loan fund available for tribal enterprises and it authorized the Secretary of the Interior to acquire additional land or rights in land for the use of tribes. The Act further provided that lands acquired under the Act for the use of Indians would be exempt from state and local taxation. The Mescalero Apache Tribe was reorganized under the Act, it borrowed money under the Act for the present enterprise and the land here in question was made available to it under the authority of the Act. The Tribe consequently is entitled to the tax exemption provided by the Act. The fact that the land here was national forest land already owned by the federal government and was made available by it for the use of the Tribe, rather than land purchased in the name of the government for the use of the Tribe, is of no significance for purposes of the statutory tax exemption. Like all provisions granting tax immunities to Indians, this exemption provision should be liberally construed in favor of the immunity.

2. Nor does the New Mexico Enabling Act authorize the State to impose the taxes at issue here. That Act expressly recognizes that Congress may, as here, subsequently grant additional tax exemptions to Indians and, in any event, authorizes the State to tax only individual Indian holdings, and not tribal holdings, of land outside reservations.

II

1. The exemption from taxation of the land provided by 25 U.S.C. 465 extends by implication to taxation of the revenues produced directly by the Tribe's use of the land. In the exceptional circumstances where Congress has wished to permit state taxation of the proceeds derived by Indians from tribal land, it has done so by means of carefully delimited legislation. Here, to the contrary, Congress has provided only an exemption from taxation.

2. It has long been established that property used by individual Indians on tax exempt lands for the development of the lands is tax exempt. *A fortiori*, where, as here, the undertaking is by a Tribe in furtherance of a plan for economic betterment approved and fostered by the government as authorized by Congress, the use of such property is tax exempt in accordance with 25 U.S.C. 465.

ARGUMENT

I

THE LAND AND OTHER REAL PROPERTY UTILIZED BY THE TRIBE IN THE OPERATION OF ITS SKI RESORT ARE EXEMPT FROM STATE TAXATION UNDER 25 U.S.C. 465

The Indian Reorganization Act of 1934 (the Wheeler Act), 48 Stat. 984–988, 25 U.S.C. 461–479, marked a significant change in federal policy concerning Indian affairs. In the years since the passage of the General Allotment Act of 1887, 24 Stat. 388, under which Congress had tried to turn communal Indians into individual land owners and farmers, total Indian land holdings had decreased from 138,000,000 acres to 48,000,000.[1] Much of the land the Indians lost was their most productive land. Some 150,000 tribal Indians were landless by 1933 and many tribes were destitute.[2] In addition to the loss of land and consequent increased Indian poverty, the purposeful attrition of tribal authority and structure had resulted in a growing Indian demoralization.

The Wheeler Act undertook to establish the legislative requisites for a revival of tribal enterprise and

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[1] Washburn, *Red Man's Land/White Man's Law*, p. 75; see also p. 47; *To grant to Indians living under Federal tutelage the freedom to organize for purposes of local self-government and economic enterprise*, U.S. Congress, Senate Committee on Indian Affairs, Hearings on S. 2755 and S. 3645, 73d Cong., 2d Sess., pp. 57–59, 271–276 (April 1934).

[2] Hearings, *supra*, note 1, p. 59.

a reversal of the trend of impoverishment.' To do so, it prohibited further allotment of Indian land, provided for tribal constitutions, encouraged tribal enterprise through loans to tribes, provided for acquisitions of land or rights in land for the use of tribes, and provided for exemption from state taxation of such land and rights in land. All of the statutory provisions at issue in this case were originally portions of that Act and should be interpreted in furtherance of the overall purposes of the Act.

The construction and operation of the ski resort at issue here are an example of the successful use of the tools for economic development provided by the Wheeler Act. The modern organization of the Mescalero Tribe was established in 1934 under Section 16 of the Wheeler Act, 25 U.S.C. 476 (App. 2–3, Stipulation 3). The Secretary of the Interior approved the Tribe's constitution as required by that Section (App. 13–40). The constitution incorporates the necessity for approval by the Secretary of the Interior of various acts of the Tribe but provides for tribal independence as to others (App. 28, Sec. 5). A feasibility study for the ski resort was made by the Bureau of Indian

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'See generally Haas, *The Legal Aspects of Indian Affairs from 1887 to 1957*, 311 Annals of the American Academy of Political and Social Science 13 (May 1957); Department of the Interior *Federal Indian Law* (Cohen, 1958 Rev.), pp. 127–133, 410–411.

Affairs and paid for by the United States (App. 3, Stipulation 3). Because the Tribe did not have capital needed to undertake the enterprise, a federal loan was arranged (App. 5, Stipulations 10, 11; see Section 10 of the Wheeler Act, 25 U.S.C. 470). And because the use of additional land was needed to undertake the enterprise, the government made additional land available for the use of the Tribe (App. 3, Stipulation 4; see Section 5 of the Wheeler Act, 25 U.S.C. 465). The resort was designed as a tribal activity to improve the Tribe's economic base and to provide employment for members of the Tribe (App. 3-4, Stipulation 6).

The New Mexico Court of Appeals in effect has held that because the federal government already owned land next to the Reservation and made it available to the Tribe, rather than purchasing new land to be held in trust by the United States for the Tribe, the Tribe is not entitled to the benefit of the tax exemption provided in the Wheeler Act, 25 U.S.C. 465. This construction, we submit, is incompatible with the congressional purpose in providing the tax exemption.

1. Because it recognized that many Indians and Indian tribes had inadequate land to provide for their economic well-being, Congress, in 25 U.S.C. 465, authorized the Secretary of the Interior to acquire ad-

ditional land for Indians or Indian tribes.* The provision is written with an obvious intent to allow land to be acquired in any practical way, rather than just through outright purchases of fee ownership. It states, "The Secretary of the Interior is authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, water rights, or surface rights to lands, *within or without* existing reservations * * * for the purpose of providing land for Indians" (emphasis supplied). The Section concludes by providing that title to such land or rights shall be taken in the name of the United States in trust for the Indian tribe (or individual Indian) "and such lands or rights shall be exempt from state and local taxation."

Under this statute, the United States unquestionably could have purchased for the Tribe taxable land (or an interest in such land) within the State of New

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*In the hearings on the bill John Collier, Commissioner of Indian Affairs, in response to a question by Senator Wheeler, Chairman of the Senate Committee on Indian Affairs, explained the necessity of acquiring land for the Indians and the necessity for innovation in the system of holding it as follows:

"* * * The bill authorizes an expenditure of 2 million a year on the purchase of land. That is not the only string we would have to our bow, but it is the most important string. * * * [W]e aim to consolidate the Indian holdings so there will be unbroken areas of Indian land which would then be held intact, and whether it be that they were rented or that they were used by Indians, could be rented or used efficiently." [Hearings, *supra*, note 1, pp. 59–60.]

Mexico, thereby removing such land from the State's tax rolls.[*] Instead, the United States here chose a method less expensive for both New Mexico and the United States. Lincoln National Forest had been taken from the public domain and made a national forest by Presidential proclamation in 1902, 32 Stat. 2018. When New Mexico became a State in 1910, its Enabling Act required the State to disclaim the right to tax such federal land (see p. 4, *supra*). Title to the National Forest is of course in the United States, and the State does not claim the right to tax national forest land. It was both logical and practical for the United States to grant the Tribe the use of a portion of the National Forest adjacent to the Reservation for the economic enterprise in question. And it would have been meaningless for the United States, which already had title to the forest, to convey title to itself for the use of the Tribe. By granting the Tribe a permit to use the forest for a specific economic purpose, the United States maintained title in itself and granted the Tribe the use of the land—the interest it needed

[*] In fiscal year 1964, however, the Appropriation Act for the Department of the Interior prohibited the "acquisition of land within the States of * * * New Mexico * * * outside of the boundaries of existing Indian reservations." 77 Stat. 99. Presumably, this restriction reflected a congressional preference for utilizing land already tax exempt for accomplishing the purposes of the Wheeler Act. Compare the Appropriation Act for fiscal year 1965, which has no such restriction for New Mexico. 85 Stat. 88.

for the ski resort.* To attach to this rational behavior the consequence that the State can tax the right of use made available to the Tribe, though it can tax neither federal land nor land held by the government in fee for the use of Indian Tribes, would unjustifiably create a windfall to the State and deprive the Tribe of the immunity it clearly would have had if non-federal (previously taxable) land had been made available to it. Surely Congress intended no such anomalous result and, we submit, the tax exemption provision of the Wheeler Act should not be construed to permit it.

Indeed, this Court has consistently held that Indian tax immunity provisions should be liberally construed in favor of the immunity. As the court explained in *Choate* v. *Trapp*, 224 U.S. 665, 675, a case in which the State of Oklahoma urged that such an immunity provision should be narrowly construed:

> But in the Government's dealing with the Indians the rule is exactly the contrary. The construction, instead of being strict, is liberal; doubtful expressions, instead of being resolved in favor of the United States, are to be resolved in favor of a weak and defenseless people, who are wards of the nation, and dependent wholly upon its protection and good faith. This rule of construction has been recognized, without excep-

*The division of ownership interests between the United States and Indian tribes is not restricted to any one legal technique. It often takes the form of fee ownership in the United States and a beneficial use in the Tribe. See *Nadeau* v. *Union Pacific RR. Co.*, 253 U.S. 442, 445–446; *United States* v. *Cook*, 19 Wall. 591; *The Kansas Indians*, 5 Wall. 737. See generally *Federal Indian Law*, *supra*, at 590–592.

tion, for more than a hundred years and has been applied in tax cases.

See also, *Squire* v. *Capoeman*, 351 U.S. 1, 5–7; *Board of Commissioners* v. *Seber*, 318 U.S. 705, 718.

It is, therefore, our position that 25 U.S.C. 465, *supra*, properly construed in light of the foregoing principles and in furtherance of the specific purposes of the Wheeler Act, of which it is a part, grants immunity from state taxation of the Tribe's use of the national forest lands at issue here.

2. New Mexico argues, however, that its Enabling Act specifically authorizes it to tax this tribal enterprise because it is located outside the Reservation. We disagree for two reasons. First, the Enabling Act allows state taxation of "property outside of an Indian reservation owned or held by any Indian * * * *except * * * to such extent as Congress has prescribed or may hereafter prescribe*" (emphasis added; see pp. 4–5, *supra*). And, as we have just urged, in the Wheeler Act Congress has prescribed such an exemption.

Second, we believe that, especially when it is read in the context of the statute and its background, it is clear that the Enabling Act's proviso concerning land outside reservations was meant to refer only to individual holdings, and not to tribal holdings. In the first part of the same sentence Congress required New Mexico to disclaim title to unappropriated land held "by any Indian or Indian tribes * * *." But the proviso allowing state taxation of land outside reservations unless Congress has provided to the contrary made reference to Indian tribes and refers only to

holdings "by any Indian." That this was not inadvertent is strongly suggested by the state of the law at the time. Indian tribes were then without hesitation considered to be federal instrumentalities whose property could not constitutionally be taxed by the states. See, *e.g.*, *Choctaw & Gulf R.R.* v. *Harrison*, 235 U.S. 292; *Indian Oil Co.* v. *Oklahoma*, 240 U.S. 522. Accordingly, in New Mexico's Enabling Act Congress specified only that the State could tax the holdings of individual non-reservation Indians unless they were exempted from taxation by an Act of Congress; and there is no reason to believe that without saying so Congress also intended to permit state taxation of tribal property, which at that time was considered constitutionally barred.

We do not believe the Court need here decide whether Indian tribes should still be considered federal instrumentalities constitutionally immune from state taxation. Early cases considered both the tribes and their lessees exempt from state taxation of Indian land or income produced from such land. *Indian Oil Co.* v. *Oklahoma*, *supra*; *Gillespie* v. *Oklahoma*, 257 U.S. 501. The immunity from taxation of lessees of the government was overruled in *Helvering* v. *Mountain Producers Corp.*, 303 U.S. 376, but the immunity of the government itself, or of an organized Indian tribe, was not overruled. Thus, this Court in *Oklahoma Tax Commission* v. *United States*, 319 U.S. 598, 603, in holding that individual Oklahoma Indians have no tax immunity as such, emphasized their lack of tribal organization and distinguished functioning tribes living on land held in

trust. See also *Oklahoma Tax Commission* v. *Texas Co.*, 336 U.S. 342, 353. *Federal Indian Law*, *supra* note 1, at 853, sums up the changes that have thus occurred in Indian law through the limitation of the federal instrumentality doctrine as follows:

> There seems little doubt in view of the foregoing that the validity, if not the scope, of the instrumentality doctrine, insofar as it relates to Indians, their property, and their affairs, remains unchanged. For just as the right to tax the lessee of State lands does not include the right to tax the State itself, so the right to tax the lessee of Indian lands does not imply a right to tax the Indians or their property.

If limited to organized tribes, this summary has considerable merit. In the present case, however, we believe the specific congressional grant of tax immunity in 25 U.S.C. 465 obviates any need for consideration of this broader issue.

II

THE EXEMPTION FROM STATE TAXATION OF LANDS OR RIGHTS IN LAND PROVIDED BY 25 U.S.C. 465 ALSO EXTENDS TO TAXATION OF REVENUES DERIVED FROM THE USE OF SUCH LANDS AND TO TAXATION OF THE TRIBE'S USE OF PROPERTY OF SUCH LANDS

If the Court agrees with our submission in point I, *supra*, that the Tribe's interest in the land and other property here is exempt by federal statute from state taxation, the remaining questions are whether the exemption also extends to taxation of revenues derived by the Tribe from the use of the land and to taxation

of the Tribe's use of materials for construction of improvements on the land.

1. So far as we are able to determine, this case presents the first attempt by a State to tax an Indian tribe on revenues derived by the tribe from the use of tax-exempt tribally held lands. The fact that in the 38 years since the passage of the Wheeler Act no such case has arisen is itself some indication of an understanding that the income from tax-exempt tribal property cannot be taxed by the States. This understanding is corroborated by the apparent assurance in this Court's opinion in *Oklahoma Tax Commission* v. *Texas Co., supra,* 336 U.S. at 353, that the immunity of the tribe itself from state taxation of the production of tribal land remains though its non-Indian lessees henceforth could be taxed on such production.

Moreover, in a series of cases concerning federal income taxation, it has become well established that the income derived by Indians directly from use of Indian land which is itself tax exempt is not taxable (unless Congress has specifically authorized such taxation). See *Squire* v. *Capoeman, supra; United States* v. *Daney,* 370 F. 2d 791 (C.A. 10); *Big Eagle* v. *United States,* 300 F. 2d 765 (Ct. Cl.); *Stevens* v. *Commissioner,* 452 F. 2d 741 (C.A. 9). Indeed, in *Stevens,* though the government disputed whether certain tracts were tax exempt, it did not claim the right to tax income produced directly through the use of land that is tax exempt.

Where state taxation is concerned, because of the limited state responsibility for reservation Indians and the special protections granted the tribes by federal

treaties and statutes, there is even less reason to permit taxation of tribal income from tax exempt land. As the Wheeler Act recognized (see p. 9, *supra*), Indian property, if it is to be used effectively, must often be used communally as in the present tribal enterprise. A state tax on a tribal activity can thus siphon off revenues that would otherwise have accrued to tribal members, too poor to be taxed as individuals. It therefore remains important today, as in the nineteenth century (see pp. 13–14, *supra*), that tax exemptions of Indian tribes be interpreted liberally to achieve their purpose of reserving to the members of the tribe the benefits of such income as the tribe can produce. Accordingly, where, as here, the enterprise in question is on land made available to the Tribe by the federal government and the Tribe's course of conduct is approved and fostered by the government under the Wheeler Act, that Act's tax exemption provision should be interpreted broadly enough to effectuate the policy of the Act—namely, that the land provided by the United States for the Tribe's use serve as a tax-free base for the Tribe's economic support and well-being.

In the exceptional circumstances where Congress has wished to permit state taxation of the proceeds derived by Indians from tax exempt lands, it has done so by means of carefully delimited, specific legislation. For example, 25 U.S.C. 398 specifically authorizes the

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Moreover, since the tax here is on gross receipts rather than net income, its potential interference with the purpose of the Wheeler Act is accentuated, because it is not limited to profits but could require payment from the tribal treasury.

States to tax mineral production on unallotted tribal lands as if produced on unrestricted land, but only within the confines of safeguards specified in the federal statute. There is no such congressional authorization for the New Mexico taxes at issue here; to the contrary, Congress has provided tax exemption.

2. For similar reasons, we believe the federal statutory exemption applies also to the imposition here of New Mexico's use tax. Indeed, this Court has previously spoken on this subject. In *United States* v. *Rickert*, 188 U.S. 432, the State of South Dakota attempted to collect a tax on permanent improvements that individual Indians had placed on their allotted lands and on personal property used by the Indians in farming the land. In a suit brought by the United States to enjoin the collection of the tax, this Court held that even though South Dakota may not classify the improvements as part of the realty "[t]he fact remains that the improvements here in question are essentially a part of the lands, and their use by the Indians is necessary to effectuate the policy of the United States" 188 U.S. at 442. As to cattle, horses and other property of like character, the Court said (188 U.S. at 443–444):

> * * * The personal property in question was purchased with the money of the Government and was furnished to the Indians in order to maintain them on the land allotted during the period of the trust estate, and to induce them to adopt the habits of civilized life. It was, in fact, the property of the United States, and was put into the hands of the Indians to be

used in execution of the purpose of the Government in reference to them. The assessment and taxation of the personal property would necessarily have the effect to defeat that purpose.

As stated by the Solicitor of the Department of the Interior (quoted in *Federal Indian Law, supra* at 865):

> From a legal [*i.e.*, tax] viewpoint the purposes and concern of the Government are identical whether the plow or cattle are bought by the Indians with individual Indian moneys, the expenditure of which has been approved by the Superintendent, or bought by the Indians with revolving loan funds or judgment fund money, pursuant to a plan of rehabilitation approved by the Superintendent * * *. The important factor is the acquisition and use of the property in execution of a government plan for the Indians.

A fortiori, where the undertaking is a tribal one rather than an individual one and is under the authority of specific federal legislation, it is proper to construe the applicable federal statutory exemption, which was designed for the Indians' economic betterment, to bar state taxation of the personal property used by the Tribe for the improvement of tribal land. As petitioner correctly states (Pet. 7): "Tribal property was not subject to state taxation when the horse and plow were utilized for economic development. The means have changed, such as the ski enterprise in this case, but the purpose is unchanged."

CONCLUSION

The judgment of the New Mexico Court of Appeals should be reversed and the case should be remanded for entry of an order requiring refund of the taxes and penalties collected by New Mexico from the Mescalero Apache Tribe.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.
KENT FRIZZELL,
Assistant Attorney General.
HARRY R. SACHSE,
Assistant to the Solicitor General.
CARL STRASS,
EVA R. DATE,
Attorneys.

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